

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY EMICK,

Defendant and Appellant.

D043394

(Super. Ct. No. SCN162760)

APPEAL from a judgment of the Superior Court of San Diego County, Yuri Hofmann, Judge. Affirmed.

A jury convicted Tony Emick of transporting a controlled substance. (Health & Saf. Code, § 11379.) In a bifurcated hearing, the court found he had one strike prior (Pen. Code, §§ 667, subds. (b)-(i), 668, 1170.12), two prior convictions of possessing a controlled substance for sale (Health & Saf. Code, §§ 11378, 11370.2, subd. (c)), and had served three prior prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced him

to prison for six years: double the three-year middle term for transporting a controlled substance with a strike prior. The court struck the prior drug-possession and prior prison term enhancements. (Pen. Code, § 1385.) Emick contends the trial court committed reversible error in responding to a jury inquiry during deliberations.

FACTS

On May 24, 2003, a car driven by Emick approached a gate to Camp Pendleton. A male was in the front passenger seat and a woman was in the rear seat. Roland Yglesias was the officer in charge at the gate. Because the car did not have a Department of Defense decal, Yglesias asked for identification and where the car occupants were going. Emick said they had made a wrong turn, he was unable to produce a driver's license, and appeared to be under the influence. Yglesias referred the car to the secondary inspection area. There, a sentry found 3.41 grams of methamphetamine in a baggie in plain sight on the passenger-side floorboard, 10.32 grams of methamphetamine in baggies in the front passenger's sock, and methamphetamine residue in syringes found in the woman's purse. At trial, Emick presented no witnesses.

DISCUSSION

Emick contends the trial court erred in responding to a jury question during deliberations regarding unanimity. When a defendant is charged with one count and the evidence shows the defendant committed more than one act that could have fallen within a guilty verdict, the jury must be instructed that in order to enter a guilty verdict it must unanimously agree on the act underlying the conviction. (*People v. Diedrich* (1982) 31

Cal.3d 263, 280-282.) This principle of law is expressed in CALJIC No. 17.01, which, as given, provides:

"The defendant is accused of having committed the crime of Transporting a Controlled Substance. The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction on Count 1 may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts. However, in order to return a verdict of guilty to Count 1, all jurors must agree that he committed the same act. It is not necessary that the particular act agreed upon be stated in your verdict."

During deliberations, the jury asked the court:

"We agree he had and knew he had substances in the car. We do not unanimously agree on the syringes or packets. Do we have to agree one of these unanimously? Second question. Is the driver of the vehicle necessarily a transporter?"

When the court and counsel met to discuss the inquiry, the following colloquy occurred:

"[District Attorney]: That is a good question.

"THE COURT: May I make a suggestion?

"[District Attorney]: Absolutely.

"THE COURT: As to the first question, I would refer them to instruction number 17.01 which, I believe, contains the answer.

"[Defense Counsel]: I agree."

At the outset, we note the court responded to the jury's inquiry in the manner Emick's trial counsel agreed was proper. Emick does not argue that the instruction as given fails to accurately express the law. Rather, relying on *People v. Thompkins* (1987)

195 Cal.App.3d 244 and *People v. Gonzales* (1999) 74 Cal.App.4th 382, he now argues the trial court provided an inaccurate response to the question regarding unanimity.

Even if the trial court erred here in telling the jury to reread CALJIC No. 17.01 rather than specifically answering the question the jury asked, the error was harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24 standard. The jury asked, "We agree he had and knew he had substances in the car. We do not unanimously agree on syringes or packets. Do we have to agree on one of these unanimously?" The trial court correctly found that CALJIC No. 17.01 answers this question when it says, "to return a verdict of guilty to Count 1, all jurors must agree that he committed the same act."

We assume the jury followed the court's instruction to reread section 17.01. (See *People v. Benson* (1990) 52 Cal.3d 754, 793.) When the jury reread CALJIC No. 17.01 it no doubt saw the question it asked was answered. Emick suffered no prejudice by the court not specifically answering the jury's question.

Likewise, the trial court did not err in its response to the second part of part of the jury inquiry, whether "the driver of the vehicle [is] necessarily a transporter[.]" Any response other than "no" would have lead to confusion or would not have been accurate. As the attorney general points out, the driver of a vehicle is not a "transporter" if he or she does not know there are drugs in the car, and this was a principle issue argued by the parties.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.